

## STATEMENT OF THE CASE

through February 24, 2011, the date of claimant's last examination with Dr. Morgan; and that claimant should be awarded his past treatment costs and authorized future medical treatment.

### **ISSUES**

Claimant asks review of the ALJ's finding that his injuries did not arise out of and in the course of his employment with respondent. Claimant argues travel was intrinsic to his employment and the "going and coming" rule is not applicable to this accident.

Respondent argues the claimant's accidental injury did not arise out of and in the course of his employment. Respondent asserts there was no causal connection between the nature, conditions, obligations and incidents of claimant's employment and the accidental injury and, further, claimant's claim is barred by the "going and coming" rule as set out in K.S.A. 2010 Supp. 44-508(f). Respondent also argues that claimant's failure to use his seatbelt at the time of the accident bars his recovery pursuant to K.S.A. 2010 Supp. 44-501(d)(1).

The issues for the Board's review are:

(1) Did claimant sustain accidental injuries that arose out of and in the course of his employment with respondent? Is claimant's case barred by the "going and coming" rule?

(2) Is claimant's claim barred because of his failure to wear a seat belt at the time of the accident?

### **FINDINGS OF FACT**

At the time of his accident, claimant was 23 years old. He began working for respondent, an oil drilling company, on September 28, 2010, as a back-up hand. He performed heavy labor at drilling sites in an area surrounding Bazine, Kansas. Claimant lived in Pawnee Rock, Kansas. In order to get to the site of the well at which he would be working, he would travel to Great Bend, Kansas, where he caught a ride with his supervisor, Kenneth Roach. Normally, he would ride back to Great Bend with Mr. Roach after his shift and then drive himself back home to Pawnee Rock. Claimant worked the day shift from 7 a.m. to 3 p.m.

Claimant said as part of his employment with respondent, he was required to travel from his home to various remote drilling sites and that the sites changed from time to time. Claimant acknowledged he would not have been paid mileage for the trips to the various well sites even if he drove his own vehicle. He was not paid an hourly wage for the time he rode from Great Bend to the drilling sites and then back to Great Bend. His pay started once he arrived at the various drilling sites and ended when he clocked out at the drilling sites. He received no per diem for the drive back and forth to the well site.

On October 10, 2010, claimant's wife dropped him off in Great Bend, and claimant rode with Mr. Roach to the drilling site near Bazine. On that day, however, claimant made arrangements to ride back to Pawnee Rock with Christopher Lamaster, who also lived in Pawnee Rock. Mr. Lamaster normally worked for respondent on the night shift from 11 p.m. to 7 a.m., but on the date of the accident he was working a double shift and got off work at the same time as claimant. The trip back to Pawnee Rock with Mr. Lamaster was a more direct route home than going through Great Bend. Claimant acknowledged that he left with Mr. Lamaster that afternoon for his own convenience so he would not have to wait for his wife to travel to Great Bend to pick him up.

As claimant and Mr. Lamaster started to leave the drilling site at the end of their shift on October 10, 2010, they noted Mr. Lamaster's vehicle had two low tires. They put air in the tires at the drilling site before they left. Mr. Lamaster was driving, and claimant was a passenger. Claimant said at the time he and Mr. Lamaster left the drilling site, he was wearing a seat belt. On the way home, a back tire on Mr. Lamaster's vehicle started getting low, so they stopped to air the tire back up using a cigarette lighter pump. Claimant got out of the car to assist in this effort. They only let the tire air up about 10 minutes, which only aired the tire about halfway, because Mr. Lamaster was in a hurry to get home. When claimant got back in the vehicle, he did not refasten his seat belt. Shortly thereafter, the tire blew out and the vehicle started rolling over. Claimant was ejected from the vehicle and suffered multiple injuries. Claimant testified that he and Mr. Lamaster did not make any stops after leaving the drilling site, other than to add air to the vehicle's tire, and did not deviate in any way from the route to Pawnee Rock.

Kenneth Roach works for respondent as a daylight driller. As a driller, he is supervisor of one of respondent's drilling crews. In October 2010, his crew consisted of the derrick man, Garrett Schneip, who worked directly under Mr. Roach; the chain man, Shane Link, who worked directly under Mr. Schneip; and the backup hand, claimant, who worked directly under Mr. Link. The backup hand is the "low man on the totem pole" of the crew.

Mr. Roach said that it takes about seven days to drill an oil well. Once the drilling is finished, the rig is dismantled, loaded onto a truck, and moved to a new location where it is reassembled. Accordingly, the crews travel to remote well sites that change about every week. All the well sites were within a 10-mile radius of Bazine. Mr. Roach lives in Great Bend, which is about a 60-minute drive to the well site. His chain man, Mr. Link, also lives in Great Bend. Mr. Roach would pick up Mr. Link and claimant at the home of Mr. Link and drive them to the site where the crew was working and return them to Mr. Link's home at the end of the shift. Mr. Roach drove his personal vehicle and was paid mileage for the trips to and from Great Bend to the well site because he was transporting members of his crew. Neither claimant nor Mr. Link, however, would have been paid mileage if they had driven their personal vehicles to the drilling site. Mr. Schneip, his derrick man, lived in the Bazine area and drove his personal vehicle to the well site. Mr. Schneip was not paid mileage for the trips to and from his home to the site. Mr. Roach testified that anyone

who worked on his crew could live where they wanted but had to be willing to travel to the remote well sites. The crew members were offered transportation to the sites from Great Bend. However, they were not required to ride with Mr. Roach, and the crew members were able to drive their own vehicles to the remote sites, as did Mr. Schneip.

Mr. Roach said that on October 10, 2010, Mr. Link could not work his normal day shift and arrangements were made for Mr. Lamaster to cover his shift. Mr. Link and Mr. Lamaster asked permission of Mr. Roach because he was the supervisor. On that morning, Mr. Roach picked up claimant at Mr. Link's home, and claimant told Mr. Roach he would not be riding home with him. Claimant told him he would be riding with Mr. Lamaster because they both lived in Pawnee Rock and his riding home with Mr. Lamaster would mean his wife would not have to drive to Great Bend to pick him up. Mr. Roach said that would be fine. He stated Pawnee Rock was about 10 miles closer to the drilling site than Great Bend. He stated he did not direct Mr. Lamaster or claimant as to which route to take to get to Pawnee Rock. Mr. Roach left the drilling site before Mr. Lamaster and claimant. He did not recall anything about whether Mr. Lamaster and claimant had to air up tires on Mr. Lamaster's vehicle. He was told about the accident later than evening when he was called first by Mr. Link and then by claimant, who told him he was in the emergency room and had been involved in a motor vehicle accident when the tire on Mr. Lamaster's vehicle blew out.

Respondent had a policy that stated:

Seat belts will be used by all employees and all occupants of vehicles driven on official business. This requirement applies to all personal vehicles (which receive reimbursement for mileage) used by employees which are used to transport crews from home to the rig site and back. This requirement applies to all company owned vehicles as well.<sup>1</sup>

Although claimant signed a form on his first day of work, September 28, 2010, that contained this language on the back of the form, he testified he did not know of respondent's seat belt policy. He stated he was not asked by Mr. Lamaster to fasten his seat belt and does not know why he did not fasten the seat belt when he returned to the car after trying to air up the tire.

After the accident, claimant was transported by ambulance to Larned emergency room and from there was air-flighted to a hospital in Wichita. Dr. Jonathan Morgan, a board certified neurosurgeon, first saw claimant on October 11, 2010. Claimant had been involved in a motor vehicle accident as an unrestrained passenger. He had been ejected from the vehicle but had suffered no loss of consciousness. Dr. Morgan examined claimant and found he had suffered injuries to his cervical and lumbar spine but did not

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<sup>1</sup> P.H. Trans., Resp. Ex. A.

have any significant neurological injury. Dr. Morgan said claimant had some nondisplaced facet fractures to the cervical spine but there was no evidence of vascular injury and the facet fractures looked stable in nature. Claimant also suffered a burst fracture to the lumbar spine at L-1. Claimant was placed in a cervical collar and a lumbar brace.

Dr. Morgan followed up with claimant after his release from the hospital on October 13. As of his examination of claimant on November 23, 2010, claimant was still intact neurologically. Nevertheless, he believed claimant was temporarily and totally disabled from performing work in the oil fields due to claimant's complaints of significant, progressive pain in his back. He provided claimant with a work slip indicating he would be unable to return to work until further notice.

Dr. Morgan next saw claimant on December 14, 2010. Claimant was doing better and felt he was improving. Dr. Morgan again provided claimant with a work slip indicating he would be unable to return to work in the oil fields. When he saw claimant again on February 24, 2011, claimant's pain had become increasingly more severe. Tests showed there had been no change in his compression fracture at L1. He gave claimant the option of continued conservative treatment or surgery, and claimant decided to have the surgery. The surgery would have been a posterior fusion at T11 through L3. Dr. Morgan did not know why claimant's symptoms became worse prior to his office visit on February 24, 2011, but presumed claimant was having instability due to the L1 burst fracture. The reason for the surgery would be to reduce claimant's pain. From a neurological standpoint, it would not have been a mandatory or necessary surgery. Dr. Morgan believed claimant remained temporarily totally disabled from employment as a derrick hand in the oil field and provided him with a work slip keeping him off work for the next five to six months.

Claimant was scheduled for surgery in March 2011, but on the date the surgery was scheduled, claimant told Dr. Morgan he did not want to proceed with the surgery. The procedure was cancelled, and Dr. Morgan has not seen claimant since. Dr. Morgan has left his practice in Wichita and has moved to Idaho. He continues to believe surgery would be a reasonable and necessary treatment of claimant's injuries.

Dr. C. Reiff Brown is a board certified orthopedic surgeon who currently only performs independent medical examinations. He saw claimant on June 16, 2011, at the request of claimant's attorney. Claimant gave him a history of the motor vehicle accident where he was thrown from the vehicle, as well as a history of his hospitalization and follow-up with Dr. Morgan. Claimant told Dr. Brown he was not having a big problem with his neck, he had no pain in that area at that time, and he had nearly full range of motion. Claimant told Dr. Brown he was having considerable problems with his low back. He had tenderness and pain in that area, as well as limited range of motion. He could only perform light household activities and standing or prolonged sitting aggravated his back pain. He denied extremity pain or neurologic complaints.

Dr. Brown stated that the medical records he reviewed, including the medical records of Dr. Morgan, were consistent with the history given by claimant of his injuries. After examining claimant, he diagnosed him as having suffered C2 and C6 fractures, a compression fracture of L1 with fractures of the posterior elements including spinous processes of T12 and L1. He also diagnosed claimant with fractures of transverse processes of T11, T12 and L1. Dr. Brown said all of claimant's treatment was a result of the rollover accident of October 10, 2010. He believed claimant was temporarily totally disabled from the date of the accident, October 10, 2010, until such time as he saw him on June 16, 2011.

Dr. Brown said claimant had a good result from the immobilization and conservative treatment of his cervical spine facet fractures. When Dr. Brown saw claimant, he had not had any surgical procedure to treat his L1 compression fracture. Dr. Brown believed claimant was a candidate for surgery, stating that it would stabilize his spine, probably decrease the displacement, and eliminate some of the wedging, which would give claimant the ability to stand more upright. Dr. Brown said surgery would probably not improve claimant's range of motion but should decrease his pain. Assuming claimant had no surgery, Dr. Brown considered him to be at maximum medical improvement. In the future, Dr. Brown opined that claimant would need analgesic medications, muscle relaxants and physical therapy.

Based on the AMA *Guides*,<sup>2</sup> Dr. Brown found that claimant's cervical injuries at C2 and C6 both satisfied the criteria of DRE Cervicothoracic Category II for a 5 percent impairment. Dr. Brown said claimant had posterior element fractures of the cervical spine which would be prone to develop traumatic arthritis in the future. That was primarily the basis for giving claimant the 5 percent rating for the fractures. He also found claimant's compression fracture at L1 satisfied the criteria of DRE Lumbosacral Category IV, for a 20 percent impairment. Using the Combined Values Chart, the impairments combined for a total 28 percent permanent partial impairment of function to the whole body.

Dr. Brown said the AMA *Guides*, Range of Motion Model at Table 75, page 113, showed a 4 percent impairment for each vertebra with a fracture of a posterior element, a pedicle or articular process or transverse process. Using that table, claimant would have an 8 percent impairment to the cervical spine. If he combined claimant's 20 percent impairment to the lumbar spine with 8 percent to cervical spine (using Table 75), claimant would have a 26 percent permanent partial impairment to the whole person.

Dr. Brown stated he did not believe claimant would be able to work in the oil fields in the future. He stated that claimant could do very light manual labor but would have to have a job that would allow him to intermittently sit, stand and even lie down. He

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<sup>2</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

recommended claimant have restrictions to avoid work that would require frequent extension and lateral and rotational movement of the neck. He should avoid work that caused him to be in a standing or sitting position for long periods of time. He should avoid lifting more than 20 pounds occasionally and that lifting would have to be done from the knuckle level rather than lifting from knee level or lower. Claimant would have to avoid frequent flexion and rotation of his lumbar spine greater than 30 degrees.

Dr. Chris Fevurly is board certified in internal medicine and preventative medicine with certification in occupational medicine. He is a certified independent medical examiner. He evaluated claimant on September 23, 2011, at the request of respondent. Claimant's chief complaint was constant low back pain with numbness down the back of his left leg. His pain radiated from the back of the left leg down below the left knee. The majority of claimant's pain was in his back rather than his leg. Claimant said he had occasional neck ache.

After examination, Dr. Fevurly's diagnosed claimant with non-displaced fractures of the facets at C2 and C6 with occasional residual neck pain. Follow up CT scans showed that the fractures have healed. Claimant had a compression fracture of L1 with five millimeters of retropulsion of the L1 vertebral body, which had stabilized. Claimant suffered fractures of the posterior elements of T12, L1 and L2. He also had spinal process fractures from T5 through T12, which had healed without residuals. Claimant also had two rib fractures that healed. Dr. Fevurly opined claimant's injuries were the result of the motor vehicle accident.

Using the *AMA Guides*, Dr. Fevurly rated claimant as being in DRE Cervicothoracic Category II for a 5 percent whole person impairment for the fractures at C2 and C6. He did not agree with Dr. Brown that the fractures should be rated separately. Further, he rated claimant as having a 5 percent impairment for the multiple spinal process fractures from T5 to T12. And for the L1 compression fracture, he found claimant to be in DRE Lumbosacral Category III for a 10 percent impairment. These would combine to give claimant a total 19 percent permanent partial impairment to the body as a whole.

Dr. Fevurly placed claimant in the medium work level and restricted his lifting to 40 pounds on an occasional basis and 30 pounds frequently. He recommended claimant avoid prolonged or repetitive bending and stooping. Dr. Fevurly did not believe claimant would be a good candidate for a fusion because there had been no neurological compromise. He opined that claimant was at maximum medical improvement. As far as future treatment, he believed that claimant could use analgesics for his pain complaints.

**PRINCIPLES OF LAW**

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.<sup>3</sup> Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.<sup>4</sup>

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.<sup>5</sup>

K.S.A. 2010 Supp. 44-508(f) provides in pertinent part:

The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which

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<sup>3</sup> K.S.A. 2010 Supp. 44-501(a).

<sup>4</sup> *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

<sup>5</sup> *Id.* at 278.

is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer.

K.S.A. 2010 Supp. 44-508(f) is a codification of the "going and coming" rule developed by courts in construing workers compensation acts. This is a legislative declaration that there is no causal relationship between an accidental injury and a worker's employment while the worker is on the way to assume the worker's duties or after leaving those duties, which are not proximately caused by the employer's negligence.<sup>6</sup> In *Thompson*, the Court, while analyzing what risks were causally related to a worker's employment, wrote:

The rationale for the "going and coming" rule is that while on the way to or from work the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment.<sup>7</sup>

But K.S.A. 2010 Supp. 44-508(f) contains exceptions to the "going and coming" rule. First, the "going and coming" rule does not apply if the worker is injured on the employer's premises.<sup>8</sup> Another exception is when the worker is injured while using the only route available to or from work involving a special risk or hazard and the route is not used by the public, except dealing with the employer.<sup>9</sup>

The Kansas appellate courts have also held that the "going and coming" rule does not apply when the worker is injured while traveling in a motor vehicle on a public roadway and the travel is an integral part or is necessary to the employment.<sup>10</sup>

K.S.A. 2010 Supp. 44-501(d)(1) provides:

If the injury to the employee results from the employee's deliberate intention to cause such injury; or from the employee's willful failure to use a guard or protection against accident required pursuant to any statute and provided for the employee, or a reasonable and proper guard and protection voluntarily furnished the employee by the employer, any compensation in respect to that injury shall be disallowed.

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<sup>6</sup> *Chapman v. Victory Sand & Stone Co.*, 197 Kan. 377, Syl. ¶ 1, 416 P.2d 754 (1966).

<sup>7</sup> *Thompson v. Law Offices of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

<sup>8</sup> *Id.* at Syl. ¶ 1. Where the court held that the term "premises" is narrowly construed to be an area controlled by the employer.

<sup>9</sup> *Id.* at 40.

<sup>10</sup> *Craig v. Val Energy, Inc.*, \_\_\_ Kan. App. 2d \_\_\_, \_\_\_ P.3d \_\_\_ [2012 WL 892194]; *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556 rev. denied 235 Kan. 1042 (1984).

The foregoing statute is supplemented by K.A.R. 51-20-1 which provides:

The director rules that where the rules regarding safety have generally been disregarded by employees and not rigidly enforced by the employer, violation of such rule will not prejudice an injured employee's right to compensation.

As previously noted, the administrative regulation promulgated to implement the requirements K.S.A. 44-501(d) mandates that when safety rules are generally disregarded by employees and not rigidly enforced by the employer, then violation of the rules will not prejudice an injured employee's right to compensation.

K.S.A. 44-510e(a) (Furse 2000) states in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

#### **ANALYSIS**

Claimant's job as an oil drilling crew member required that he travel from drill site to drill site. He was not paid wages when traveling from his home to whatever site the crew was working on, nor was he reimbursed for his mileage expense if he drove his own vehicle. Nevertheless, the very nature of the work necessitated travel to ever-changing locations. Travel was inherent to the job. When travel is inherent to or an integral part of the job, the going and coming rule does not apply. As such, claimant's accident, which occurred while claimant was in a vehicle traveling from the drill site to his home, arose out of the nature, conditions, obligations and incidents of his employment with respondent.

When the accident occurred, claimant was not wearing a seat belt. Respondent's policy was that all employees use the seat belt when traveling in a company owned vehicle on any official business. The seat belt policy expressly provided that the requirement applied to employee travel in personal vehicles used to transport crews from home to the rig site and back and which received reimbursement for mileage. Although claimant was a passenger in a personal vehicle being used to transport members of the crew to their homes, mileage for the trip was not being reimbursed. Accordingly, by its terms, the respondent's seat belt policy did not apply to the trip where claimant was injured. The language of the policy itself is, however, further evidence of the inherent nature of travel to the employment.

### **CONCLUSION**

(1) Claimant sustained personal injuries by accident on October 10, 2010, that arose out of and in the course of his employment with respondent.

(2) Claimant's claim for workers compensation benefits is not barred because of his failure to wear a seat belt at the time of his accident.

(3) Claimant is entitled to temporary total disability compensation for the period from October 10, 2010, through February 24, 2011.

(4) Claimant has a 23.5 percent impairment of function and a 50 percent permanent partial general (work) disability.

(5) Claimant is entitled to payment by respondent of all reasonable and related past medical expenses subject to the provisions of the medical fee schedule, and ongoing and future medical treatment.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated December 12, 2011, is reversed and claimant is entitled to an award as follows:

Claimant is entitled to 19.57 weeks of temporary total disability compensation at the rate of \$545 per week or \$10,665.65 followed by permanent partial disability compensation at the rate of \$545 per week not to exceed \$100,000 for a 50 percent work disability.

As of April 24, 2012, there would be due and owing to the claimant 19.57 weeks of temporary total disability compensation at the rate of \$545 per week in the sum of \$10,665.65 plus 60.72 weeks of permanent partial disability compensation at the rate of \$545 per week in the sum of \$33,092.40 for a total due and owing of \$43,758.05, which

is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$56,241.95 shall be paid at the rate of \$545 per week until fully paid or until further order from the Director.

Respondent shall designate an authorized treating physician. The remaining orders of the ALJ are adopted by the Board to the extent they are not inconsistent with the above findings and conclusions.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of April, 2012.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER PRO TEM

**DISSENT**

The undersigned respectfully dissent from the order of the majority in this matter. The majority found that the “going and coming” rule of K.S.A. 2010 Supp. 44-508(f) did not apply to this matter as travel was inherent to the job. The majority then cites *Craig v. Val Energy, Inc.*, \_\_\_ Kan. App. 2d \_\_\_, \_\_\_ P.3d \_\_\_ [2012 WL 892194], and *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984), in support of its decision. However, the facts of this case do not sit squarely with either *Craig* or *Messenger*. In both *Craig* and *Messenger*, the injured claimant was working in a situation where the driller was paid to drive the crew to the job site. The claimant in *Craig* was given the responsibility of hauling crew members to and from the job site and was actually paid \$24 per day for each crew member who came to work. Obviously this arrangement was beneficial to both Craig and his employer.

In analyzing *Messenger*, the court in *Craig* found that the claimant was (1) reimbursed for his travel, (2) had no permanent work site, (3) transported members of the crew to the shop and job site and was paid for the workers' presence at the job, and (4) there was a mutual benefit from this transportation arrangement. In this instance, claimant was not paid for his time or his travel. It is true there was no permanent work site, but that is the only similarity between this matter and both *Craig* and *Messenger*. The transportation arrangement in this matter would have caused claimant to return to Great Bend with his supervisor, Kenneth Roach. However, claimant rejected that arrangement and chose to travel with a co-worker in a private vehicle back home to Pawnee Rock. That decision was beneficial to claimant only. It provided no benefit to respondent. Additionally, the cause of the accident was the defective tire on the vehicle which belonged to the co-worker, a fact totally beyond the control of respondent.

A case more analogous to this matter is *LaRue v. Sierra Petroleum Co.*, 183 Kan 153, 325 P.2d 59 (1958). In *LaRue*, the court found that the decedent claimant was not furnished transportation by the respondent as part of the employment. The decedent in *LaRue* was not under the direction and subject to the control of the respondent or his supervisor, the driller, or any one else after he left work at the well location while on the trip home. At the time of the accident, the decedent was not moving to another location, but was going home after leaving the duties of his employment. The cause of the decedent's death was not the negligence of the respondent. Here, transportation was furnished by respondent but claimant rejected that offer on this occasion. When claimant left the job site, he was not under the supervision of any employee of respondent and was not moving to another job location. He was going home. The cause of the accident was not the negligence of respondent but rather the defective equipment of a co-worker. As in *LaRue*, these Board Members would find that the "going and coming" rule would apply, the Award of the ALJ should be affirmed, and claimant should be denied benefits.

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BOARD MEMBER

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BOARD MEMBER

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